United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

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75-1147

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1147

UNITED STATES OF AMERICA,
Appellant,

—against—

ALFRED FAYER,
Defendant-Appellee.

PETITION FOR REHEARING OR REHEARING EN BANC

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York

RONALD E. DE PETRIS,
Assistant United States Attorney,
Of Counsel.

4

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Miscellaneous:

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PRELIMINARY STATEMENT

The UNITED STATES OF AMERICA, by DAVID G. TRAGER, United States Attorney for the Eastern District of New York, hereby petitions for rehearing or, in the alternative, for rehearing en banc of the decision of a panel of this Court (Circuit Judges Oakes, Van Graafeiland, and Meskill) entered on September 24, 1975, which affirmed a judgment of acquittal of the United States District Court for the Eastern District of New York (Jack B. Weinstein, J.). The petition for rehearing is filed pursuant to Rule 40 of the Federal Rules of Appellate Procedure. The petition for rehearing en banc is filed pursuant

to Rule 35(a) of the Federal Rules of Appellate Procedure, which provides that, although such a petition is not favored, it is appropriate "when the proceeding involves a question of exceptional importance".

STATEMENT OF FACTS

The district court found the defendant Fayer not guilty on a charge of endeavoring to influence a grand jury witness in violation of Title 18, United States Code, Section 1503, but made special findings of fact regarding the charge. On appeal the United States argued that the finding of not guilty was based on an erroneous conception of the law, and that under the correct legal standard all of the factual issues necessary to support a finding of guilt had been resolved against the defendant.

The facts established at trial, as set forth in the panel's decision, are as follows (slip op. 6191-6192):

> Fayer was attorney for Harry and Rose Bernstein, principals of Eastern Service Corporation, and attorney for and a director of that corporation which, with the Bernsteins, was a target of an investigation into Federal Housing Authority corruption. One Edward Goodwin, an FHA appraiser who claimed to have received bribes from the Bernsteins or their corporation, had agreed to cooperate with the Government. Goodwin, equipped with a recording device, met with the Bernsteins on February 8, 1972, and with the Bernsteins and Fayer on February 9, 1972. The tape of the February 9 conversation is the basis for the charge appealed upon; it appears to us to disclose Fayer endeavoring to convince Goodwin not to go before the grand jury and not to talk. Fayer's defense below was that he was trying to give legal advice to Goodwin (although he was also concerned with protecting the Bernsteins and Eastern Service) and in the taped conversation he expressed shock and amazement at the advice given to Goodwin by the latter's "inexperienced" and not "qualified" lawyer who had suggested that cooperation with the Government

> was a possible alternative for Goodwin to choose. Fayer attempted to induce Goodwin to drop his attorney in favor of Fayer's counsel below and on this appeal, whose fees chargeable to Goodwin were to be paid by the Bernsteins. Fayer further indicated approval of the Bernsteins' offer to Goodwin to work in their Florida office in the event that Goodwin lost his FHA job....

Therefore, as the panel indicated in its opinion, the essential facts included appellee "Fayer's endeavoring to influence a prospective witness [Goodwin], when the latter's counsel was not present, not to testify voluntarily in a grand jury investigation in which Fayer's clients [the Bernsteins and Eastern Service Corporation] were targets" (slip op. at 6192). Whether or not Fayer acted with a "corrupt" motive was the determinative issue at trial. The United States contended that Fayer had the improper motive to protect the Bernsteins. The defense contended that Fayer's motive was to give legal advice to Goodwin (although admittedly he was also concerned with the Bernsteins and was aware that his advice to Goodwin could inure to their benefit).

The district court acquitted Fayer, because although Fayer clearly had the motive to protect the Bernsteins it could not find beyond a reasonable doubt that he did not also have the motive to give legal advice to Goodwin. In its decision on appeal the panel appears to have agreed that our view of the law (it is sufficient to convict if Fayer acted with an improper motive of protecting the Bernsteins, even if he also acted with

the motive of giving legal advice to Goodwin) is correct. However, applying the standard set forth in United States v. Jenkins, 420 U.S. 358 (1975), the panel felt constrained to interpret the findings below as not being sufficiently "clear" that the district court, either expressly or impliedly, had found the motive of protecting the Bernsteins to be improper or corrupt.

REASONS FOR GRANTING THE PETITION

(1)

The chief reason warranting further consideration of the instant case by the Court of Appeals lies in its conception as to what would have to be found before Fayer's motive of protecting the Bernsteins could be deemed to be improper or "corrupt" within the meaning of the applicable statute. In interpreting the findings below as to whether in the district court's view Fayer's motive to protect the Bernsteins was improper or "corrupt", the panel defined the term in this context as Fayer having acted with knowledge of crimes committed by his clients (slip op. at 6194, 6195). We respectfully submit that this rather narrow conception of "corrupt" in this context is erroneously restrictive, and will very likely have an enormous adverse impact on the due administration of justice.

In our view it is improper conduct for an attorney to endeavor to influence a witness not to testify before the grand jury in order to protect his client, whether or not the attorney believes in his client's innocence. Cf. ABA Standards Relating to the Prosecution Function and the Defense Function: The Defense Function, §4.3(c) (1971) (see the language of the provision at Supp. p. 16 and the commentary at p. 230, indicating that a lawyer should not <u>discourage</u> or obstruct communication between witnesses and the prosecution); Code of Professional

Responsibility, DR 7-104(A)(2) (a lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client).

In the case at bar Fayer admitted that he was aware of the possibility that Goodwin might testify against the Bernsteins, (A. 263-264, 266, 281-283, 286, 295, 307, 314), and the possibility that the Bernsteins were involved in criminal activity with Goodwin (A. 307). Surely Congress did not intend that an attorney in such a situation might with impunity endeavor to influence the witness not to testify voluntarily before the grand jury in order to protect his clients, even if he believed in their innocence. Such action is improper and simply contrary to the due administration of justice. Since the statute herein was designed to protect witnesses and prevent the obstruction of the due administration of justice, such conduct falls within its proscriptions.

The instant situation may be contrasted with one in which an attorney, without the exercise of undue influence, seeks to influence a witness to give certain testimony favorable to his client which conflicts with prior testimony given by the witness. In that situation the statute does not proscribe such conduct if the attorney actually believes that the testimony

sought is true, because influencing a witness to tell the truth is consistent with the due administration of justice. See Cole v. United States, 329 F.2d 437, 439, 441 (9th Cir.), cert. denied, 377 U.S. 954 (1964). However, in the case at bar, appellee Fayér did not endeavor to influence the witness to give testimony which Fayer believed to be true, but rather not to testify voluntarily before the grand jury-- an act clearly not consistent with the due administration of justice.

Moreover, the panel's conception of a "corrupt" motive in this context would appear to give attorneys an unwarranted license to act contrary to the proper administration of justice. As a practical matter it would allow an attorney, whenever he represented a target of a grand jury investigation who claimed to be innocent, to approach prospective witnesses in the grand jury investigation and endeavor to influence them not to testify before the grand jury. It is difficult to conceive of a more adverse impact on the due administration of justice. In the interests of justice, future enforcement of the statute, and guidance to the bar, we submit that a more appropriate and definitive ruling in this regard is called for.

(2)

There is also another compelling reason warranting further consideration by the Court of Appeals. This relates to the application of the standard set forth in Jenkins for

interpreting a district court's findings of fact on appeal from a judgment of acquittal in accordance with the proper concept of the Double Jeopardy Clause.

We suggest that the panel's conception of a "corrupt" motive as discussed above may well have affected its interpretation of the district court's findings concerning the motive to protect the Bernsteins. Since the district court did not make a specific finding as to whether Fayer had knowledge of the crimes committed by the Bernsteins, we can easily understand the panel's difficulty in interpreting the district court's findings in this regard.

However, if the conception which we have set forth above is the correct one, we submit that clearly the district court, either expressly or impliedly, found that Fayer's motive to protect the Bernsteins was corrupt. The district court found that Fayer was concerned with the "great danger" in Goodwin's testifying voluntarily before the grand jury (A.340), and was interested in "saving" the Bernsteins (A. 345), a choice of words which at the very least suggests an improper motive. On several occasions the district court juxtaposed the motive to protect the Bernsteins with the motive of giving legal advice to Goodwin, indicating that the difficult problem with the case was whether or not Fayer also had the latter motive. (A. 341, 345-346, 360). If the former motive was

not improper in its view, there would have been no need to juxtapose the two motives in this fashion - - the second motive would not have been a "problem" with the case - - for the district court would have been required to acquit Fayer regardless of whether he had the latter motive.

Moreover, given the proper conception of "corrupt" in this context, the district court's statements of belief in certain unrelated portions of Fayer's testimony (slip op. 6195)* surely do not contradict an implicit reading of the district court's findings to the effect that the motive to protect the Bernsteins was improper. As noted earlier, Fayer admitted that he was aware of the possibility that the Bernsteins had been involved in criminal activity with Goodwin and that Goodwin might testify against the Bernsteins. Finally, the district court's denial that its interpretation of "corruptly" had affected its decision (slip op. 6194-6195) was followed immediately by a statement that: "I think, myself, it would be corrupt for him to have advised had he not had as one of the subsidiary motives the giving of legal advice in good

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* It might be noted that these statements pointed to by the panel relate respectively to the motive of giving legal advice to Goodwin and to the bribery count, not to the motive of protecting the Bernsteins. Indeed, as to the latter motive, the proffered defense [(1) that while Fayer was aware that the advice to Goodwin could inure to the benefit of the Bernsteins, his only purpose in attending the meeting was to give legal advice to Goodwin, and (2) that Fayer's advice to Goodwin was intended to relate only to the latter's not talking with the FBI; A. 321-322] was rejected by the district court (A. 359-360; 340).

faith to Goodwin; that is, if the whole thing were set up to protect the Bernsteins rather than Goodwin, I would have found him guilty" (A. 360-361). Thus, whatever the district court's confusion may have been as to the meaning of "corruptly", it clearly considered the motive to protect the Bernsteins to be improper.

Given the proper conception of "corruptly" in this context, and unless one gives talismanic effect to the district court's somewhat confusing use of "corruptly" (a word which, as the panel itself apparently indicates, was misconstrued by the district court), we respectfully submit that a proper application of the Jenkins test provides no bar to a conviction herein. Where as here the district court has clearly made a finding of fact that the requisite motive existed and has clearly indicated its view that the motive is improper, requiring further that there be no general statements which could in any way be read to create a doubt that the requisite finding was made is to misconstrue the Jenkins test. Such an inflexible application of Jenkins would elevate the standard to such a high degree that the right of the United States to appeal following a non-jury trial would effectively be destroyed in most cases; as a consequence, it would discourage the waiver of jury trials by the United States.

The record is clear that both the government and the district court felt that sufficient findings of fact had been

made, and that the matter was ripe for appeal (A. 366-367). Indeed, the district court stated that if it had "misconceived the law", it would of course "change its decision" (A. 367). The standard of Jenkins is that the findings of fact be clear, not that they be clear beyond all or any reasonable doubt.

Finally, it might be pointed out that a further argument, albeit one which we believe is not necessary to make herein, can reasonably be made regarding the application of the principle set forth in Jenkins. Under Jenkins it is clear that a remand for the purpose of making additional or supplemental findings of fact is prohibited. However, our position is that the district court has at least implicitly made the required finding of fact. If there still is any doubt about it in the mind of the Court of Appeals, a remand could be made not for the purpose of making any additional findings, but solely for the purpose of having the district court answer -- yes or no -- a straight-forward question: On February 20 and 27, 1975, when the district court made its findings of fact, did it find, either expressly or impliedly, that the motive to protect the Bernsteins was improper? While concededly a broad reading of Jenkins would prohibit even this limited remand, we submit that there is no valid reason for such a broad reading of Jenkins. No meaningful purpose of the Double Jeopardy Clause would be violated by such a limited remand. Otherwise the

practical difficulties in applying the principles of Jenkins to a mixed question of law and fact, together with the confusion and erroneous view of the district court as to the law, may effectively insulate matters from appeal under Jenkins and destroy its vitality.

CONCLUSION

For the above-stated reasons, we believe that the exceptional importance of the issues involved herein, which in their relationship to and effect on the due administration of justice transcend the parameters of the instant case, warrants the granting of the petition for rehearing or, in the alternative, for rehearing en banc. The judgment of acquittal should be reversed and the case remanded with a direction to enter a judgment of conviction.

Dated: Brooklyn, New York
October 29, 1975

Respectfully submitted,

DAVID G. TRAGER
United States Attorney,
Eastern District of New York.

RONALD E. DE PETRIS,
Assistant United States Attorney,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 29th day of October 1975 he served ~~x~~ two copies of the within

Petition for Rehearing or Rehearing En Banc

by placing the same in a properly postpaid franked envelope addressed to:

Jack Korshin, Esq.
370 East Old Country Road
Mineola, N. Y. 11501

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
29th day of October 1975

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4571956
Qualified in Kings County
Commission Expires March 30, 1977